

NO. 46456-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT EDWARD DOTY JR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Robert Doty reported to his Community Corrections Officer (CCO) as instructed and gave a urine sample, which the CCO ran through a rapid screening test to detect illegal drugs. The sample came up “positive” but Mr. Doty denied using any illegal drugs. Recognizing the “InstaCup” test can be unreliable, the CCO let Mr. Doty go and sent the sample out for laboratory analysis to learn whether the appellant really violated the terms of his supervision. (A few days later, the lab declared the questionable sample negative.) Meanwhile, a different CCO with a long-standing dislike of the appellant chose to arrest Mr. Doty. DOC did not have a well-founded suspicion that a probation violation had occurred, the warrantless arrest was unlawful, and the defense motion to suppress should have been granted.

Separately, at sentencing on the one count of narcotics possession, the prosecution alleged Mr. Doty had various Washington and Oregon priors, but offered no evidence to establish any convictions. The trial court made no comparability determinations, nor did it consider whether any past crime “washed out.” The prosecution’s failure to meet its burden of proving Doty’s criminal history requires resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that a questionable rapid screening test of Mr. Doty's urine taken on September 11, 2012, established he violated a supervision condition against using controlled substances. (Findings of fact #3 and #4.)

2. The trial court erred in failing to find that lab analysis of the sample showed the rapid screening test produced a false positive.

3. The trial court erred in failing to find that two earlier rapid screenings of Mr. Doty's urine also produced false positives.

4. Appellant assigns error to finding of fact #7.

5. The trial court erred in concluding the rapid screening test result gave DOC authority to make a warrantless arrest.

6. The trial court erred in not finding the arrest was pretextual.

7. The trial court erred in finding the warrantless arrest and search lawful and in denying the defense motion to suppress.

8. The prosecution failed to meet its burden of proving Mr. Doty's criminal history at sentencing.

9. The court erred in imposing a sentence based on insufficient information proving Doty's criminal history, in violation of his right to due process of law.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A DOC officer may effectuate a warrantless arrest if there is a well-founded suspicion to believe a probationer violated a condition of supervision. RCW 9.94A.716(2). Mr. Doty denied using drugs when confronted with an alleged “positive” finding on an “InstaCup” rapid drug screening tool. His supervising CCO appropriately sent the sample for laboratory analysis to find out whether a violation had really occurred, but another CCO arrested Mr. Doty anyhow. Did the trial court err in refusing to suppress, where DOC knew similar rapid screenings of Mr. Doty’s urine had previously produced false positives, the second CCO admitted bias against Mr. Doty, and acted without waiting for the lab results?

2. An out-of-state conviction may not be included in a person’s offender score calculation unless the State proves its existence, comparability, and classification. The court accepted the State’s criminal history summary and used Oregon convictions in Mr. Doty’s offender scoring without proof of comparability and without determining if any crimes had “washed out” Did the prosecution fail to meet its burden of proof at sentencing?

D. STATEMENT OF THE CASE

Robert Doty was on Washington State Department of Corrections (DOC) supervision pursuant to an interstate compact transfer from Oregon. RP 38. He was directly supervised by Community Corrections Officer (CCO) Woolcock. RP 38. On September 11, 2012, Mr. Doty reported to his CCO's office and gave a urine sample. RP 39. Officer Woolcock ran the sample through a rapid urine screen called "InstaCup." Id. After a few minutes, the test showed "positive for methamphetamine." RP 39. Officer Woolcock said that a "positive result" would be a violation of Mr. Doty's supervision. RP 43.

Mr. Doty denied using illegal drugs. RP 45-46. Officer Woolcock did not arrest Mr. Doty because of the rapid screening. RP 40-41. Officer Woolcock knew and testified that the "InstaCup" screening tool's generates a "positive" response at a significantly lower threshold than traditional laboratory testing. RP 40, 42. He testified that he wanted the lab to analyze the sample to determine whether Mr. Doty had, or had not, violated his supervision conditions: "I just thought I'd turn it in and make sure." RP 45.¹

¹ Officer Woolcock also said that Oregon officials "like to have the lab results" and that he sent the sample "for Oregon's benefit." RP 41, 44.

After Mr. Doty left the DOC office, Officer Woolcock spoke with a different CCO, Officer Campbell, by telephone, and told him that Mr. Doty "was in earlier and he peed hot for methamphetamine." RP 43, 50. Officer Woolcock told Officer Campbell he decided not to arrest Mr. Doty on the basis of the rapid test alone. RP 45.

Officer Campbell had supervised Mr. Doty in the past and admitted he does not care for him. RP 47-48. Officer Campbell confirmed he told Mr. Doty's mother, Linda Wilsdon, that if it were up to him, Mr. Doty would not even be allowed to live in the State of Washington. RP 58-59.

In an affidavit filed with the court in support of the defense motion to suppress, Ms. Wilsdon described that Officer Campbell had been unprofessional, "rude and nasty," with her and her son. CP 25-26. In court, she testified the first time she met Officer Campbell, he arrested her son just being a little late to a DOC appointment. RP 69-70. Ms. Wilsdon remembered Officer Campbell talking down to her: "Shoo, you go on home." RP 70. Ms. Wilsdon recalled another encounter with Officer Campbell when he called Mr. Doty "lazy" and "stomped out" of her home. RP 70-71. In her declaration she wrote about Officer Campbell calling her and telling her he was "going to

recommend to Oregon that when Robert [Doty] is released from prison, he never be allowed to live in Washington ever again and if he [CCO Campbell] has it his way, that's what's going to happen." CP 26.

Later the same day that Officer Campbell spoke with Officer Woolcock about Mr. Doty, Officer Campbell and another law enforcement officer went looking to arrest people on outstanding warrants. RP 51. Officer Campbell happened to run into Mr. Doty and arrested him on sight. RP 55. Officer Campbell found a small amount of drugs on Mr. Doty's person and this possession case followed.

At the evidentiary hearing on the defense motion to suppress, Officer Campbell offered varying justifications for his decision to arrest Mr. Doty. RP 55. He claimed he saw Mr. Doty violate his supervision by speaking with Angela Stewart, who was known to Officer Campbell to be a felon. RP 53-54. Angela Stewart testified and contradicted Officer Campbell's account. RP 82. She said Mr. Doty was in her driveway that day, "backing his car out" when law enforcement "blocked him off." RP 86. She was smoking on her back porch and only waved to Mr. Doty who was on his phone and driving away. RP 86-87.

The trial court ruled that any contact with Ms. Stewart was “casual” and “not enough to support an arrest or detention.” CP 58.²

Officer Campbell also claimed that he could arrest Mr. Doty because some anonymous source called-in an accusation that Mr. Doty and another felon were involved in drug activity. RP 49. Officer Campbell refused to say who this source was. RP 59. Officer Campbell did not know how this anonymous person knew what they said about Mr. Doty. RP 60. The State conceded what Officer Campbell offered in this regard could not justify the arrest. RP 94. The trial court agreed and concluded this portion of Officer Campbell’s testimony provided “no basis to stop, detain, or contact” Mr. Doty. CP 58.

Officer Campbell also said he arrested Mr. Doty because he knew about the “InstaCup” test result. RP 55. Officer Campbell testified he knew Officer Woolcock was sending the sample to a lab. RP 66. He claimed he did not know why Mr. Doty’s supervising CCO requested the laboratory analysis. RP 66.

² In a DOC administrative hearing that came soon after Mr. Doty’s arrest, DOC found him “not guilty” of the accusation he violated supervision by the casual contact with Ms. Stewart. CP 29-30. (“State fails to prove willfull [sic] act.”)

After the arrest, Officer Woolcock wrote-up a supervision violation report, which alleged the contact with Ms. Stewart, but did not claim that Mr. Doty had ingested an illegal substances. CP 36. In the report, Officer Woolcock refers to the September 11, 2012, “InstaCup” test result as “questionable.” CP 36. The report detailed the history of Mr. Doty’s supervision and stated he “has provided 3 questionable UA’s with his last one being on 09/11/12.” CP 36. The report did not indicate if any past “questionable UA” ever led to a finding of a supervision violation. CP 36. A few days later, the lab analysis of the September 11, 2012, sample came back negative. RP 41.

The trial judge said that Officer Woodcock “was correct in doing what he did,” meaning not arresting Mr. Doty on the basis of the “InstaCup” test and waiting for laboratory test result instead. RP 107. Nevertheless, the trial judge denied the defense motion and ruled that Officer Campbell was allowed to do the exact opposite. RP 107-108, CP 56-59. The parties agreed to go forward with a stipulated facts trial. RP 110. Mr. Doty was found guilty of one count of possession of a controlled substance. CP 60-63.

Appendix 2.2 of the judgment and sentence sets out the sentencing court’s understanding of Mr. Doty’s criminal history. CP 65.

74-77. The document was prepared by the Clark County Prosecuting Attorney's Office; it represents the State's assertion of Mr. Doty's criminal history. The document is in the form of a table, with columns from left to right labeled as: "Crime," "County/State Cause No.," "Date of crime," "Date of Sentence," "DV*? YES," and finally, "PTS." CP 74-77. More than half of the entries reference alleged Oregon events, six of which have entries of "1" in the "PTS" column. CP 74-77. Four alleged Washington crimes also have such "1" entries. Id.

The last page of the document includes signature lines for the appellant and his lawyer. CP 77. Mr. Doty declined to sign and so did his counsel. CP 77.³ The State did not produce anything else in support of its claim that Mr. Doty had the criminal history the State alleged.

The oldest of the offenses allegedly counted against Mr. Doty showed a sentencing date of April 30, 1992. CP 74. This was listed as "possession of controlled substance," from Oregon. CP 74. There was a stretch of time, from 1994 until 2002, where many of the entries on the prosecutor's summary of Mr. Doty's alleged criminal history appear to

³ Defense did not submit its own criminal history and Mr. Doty himself did not acknowledge any particular criminal history. At sentencing, his lawyer, speaking after the prosecution sentencing recommendation, said "I know that that Mr. Doty is maxed out." RP 120.

be non-criminal. RP 75 (E.g. “family nonsupport,” “probation violation,” “possess multiple license.”) The record does not include any discussion of comparability, or application of the “wash out” provisions. The judgment and sentence shows the trial court calculated an offender score of “9.” CP 66. On a standard range of 12 to 24 months, Mr. Doty was given a sentence of 14 months. CP 66, 78.

E. ARGUMENT

I. **Mr. Doty was arrested without lawful authority.**

- a) Only a well-founded suspicion that a violation occurred can justify a warrantless DOC arrest.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Under both the federal and state constitutions, warrantless searches and seizures are prohibited unless a specific exception applies. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). While persons on community custody have a lesser expectation of privacy than the general public, they are still entitled to these constitutional protections. Griffin v. Wisconsin, 483 U.S. 868,

873, 107 S. Ct. 3164, 97 L. Ed. 2d. 709 (1987), State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009).

RCW 9.94A.631(1) specifies when a Washington State probationer may be arrested or searched without a warrant:

If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1).

The “reasonable cause” language of RCW 9.94A.631(1) represents a requirement of a “well-founded suspicion that a violation has occurred.” State v. Jardinez, __ Wn.App. ___, 338 P.3d 292, 295 (2014), quoting State v. Massey, 81 Wn.App. 198, 200, 913 P.2d 424 (1996). Because Washington constitutional and statutory law require a CCO to have “reasonable cause” before making a warrantless search, one conducted without that level of certainty violates the Fourth Amendment. Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); United States v. Freeman, 479 F.3d 743, 747-48 (10th Cir. 2007).

“Analogous to the requirements of a Terry stop, reasonable suspicion requires specific and articulable facts and rational inferences.” State v. Parris, 163 Wn.App. 110, 119, 259 P.3d 331 (2011) (footnote omitted) (referring to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). In the Terry stop context, “[a]rticulable suspicion” is defined as a substantial possibility that criminal conduct has occurred or is about to occur. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).”

As an exception to the warrant requirement, the Terry stop must be narrowly construed and “jealously and carefully drawn.” State v. Martinez, 135 Wn.App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

“[A] hunch does not rise to the level of a reasonable, articulable suspicion.” State v. O’Cain, 108 Wn.App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” Martinez, 135 Wn.App. at 180; accord State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). In addition, “Article I, section 7, forbids use of pretext as a

justification for a warrantless search or seizure.” State v. Ladson, 138 Wn.2d 343, 353, 979 P.2d 833, 836 (1999).

The Terry exception is more narrowly construed under our state constitution than under the Fourth Amendment. See State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the constitutionality of a warrantless seizure de novo. Martinez, 135 Wn.App. at 179.

In State v. Jardinez, this Court recently addressed the reasonable cause requirement of the warrantless search provision of RCW 9.94A.631(1). ___ Wn.App. ___, 338 P.3d 292 (2014). A CCO had a hunch that his probationer Jardinez, may have something to hide in his portable digital media player. Id. The CCO was curious about the device, “because parolees occasionally take pictures of themselves with other gang members or ‘doing something they shouldn’t be doing.’” Id. Moreover, Jardinez appeared nervous when the CCO handled the device and claimed it “only held music.” when the CCO asked about its video contents. Id. The CCO acted on his hunch searched through it and

discovered a video of Jardinez “pumping a shotgun in his bedroom.” Id.

The weapon was later found in his home.

Jardinez successfully argued that the search of the media player was unlawful. This Court rejected the State’s invitation to read RCW 9.94A.631(1) broadly and emphasized that there must be a reasonable cause nexus between the searched personal property and the alleged crime or violation. Id. at 297. Notably, the Court gave weight to this Sentencing Guidelines Commission (Commission) comment about RCW 9.94A.631(1):

The Commission intends that Community Corrections Officers exercise their arrest powers sparingly, with due consideration for the seriousness of the violation alleged and the impact of confinement on jail population. Violations may be charged by the Community Corrections Officer upon notice of violation and summons, without arrest.

Id., quoting David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981, at app. 1–13 (1985).

The arrest here similarly made without lawful authority. The State failed to prove “specific and articulable facts” from which “rational inferences” could be drawn to arrive at the belief that Mr. Doty violated supervision by ingesting illegal drugs.

- b) The supervising CCO correctly recognized that Mr. Doty ought not to be arrested because of a “questionable” result on a rapid screening of his urine for illegal drugs.

Below, the trial judge focused on the “InstaCup” reading to gauge whether Officer Campbell’s arrest of Mr. Doty was lawful. RP 80, 106. While the screening is relevant, the court’s approach was too restricted. The fellow officer rule permits probable cause to be determined upon the information possessed by the police as a whole when they are acting in concert. State v. White, 76 Wn.App. 801, 805, 888 P.2d 169, 171 (1995) aff’d, 129 Wn.2d 105, 915 P.2d 1099 (1996); State v. Macsse, 29 Wn.App. 642, 647, 629 P.2d 1349, review denied, 96 Wn.2d 1009 (1981). Here, the trial court should have considered all the facts known by DOC on September 11, 2012, that speak to the question of whether there was a well-founded suspicion that Mr. Doty violated supervision by ingesting illegal drugs.

The “InstaCup” rapid screening cannot be dispositive of the issue, in part because the technique is generally unreliable⁴, but even

⁴ The trial judge noted: “the InstaCup from my knowledge is not as accurate because it measures at lower levels and can contain things other than methamphetamine that may test positive.” RP 105.

more importantly, because DOC knew “InstaCup” testing of Mr. Doty generated two false positives prior to September 11, 2012. CP 36.

Officer Woolcock’s September 12, 2012, report does not allege that the September 11, 2012, “InstaCup” screening proved Mr. Doty violated probation by ingesting drugs; the report calls the sample “questionable.”⁵ CP 36. The same report does not indicate that Mr. Doty was ever violated for ingestion of an illegal substance, but references a total of three “questionable UA’s.” CP 36. At a pretrial hearing held on October 10, 2013, regarding Mr. Doty’s compliance with pretrial conditions of release, defense counsel relied on Officer Woolcock’s report to argue that the rapid screening tests had produced a series of false positives: “[T]hree positives by the rapid test but when they go up [to the laboratory] they’re -- they’re negative every single time.” RP 14.

Next, Mr. Doty denied using drugs when confronted with this accusation and his behavior when with his CCO reinforced his denial. Mr. Doty reported as directed and this was inconsistent with the notion that he was using drugs. Probationers who use illegal drugs would be

⁵ The laboratory analysis “negative” finding was not yet available to Officer Woolcock when he wrote this report. RP 41.

expected to not show up, either because they are intoxicated (and therefore forgot or disregarded their reporting obligation), or, because they choose to flee rather than get caught using. Furthermore, there was no indication that Mr. Doty's demeanor when reporting on September 11, 2012, suggested to Officer Woolcock that he was using drugs.

Mr. Doty's supervising CCO recognized the "InstaCup" screening results are equivocal, not determinative, and that reliable results can be had only through regular laboratory analysis. CP 36. To put it another way, DOC's past experience with Mr. Doty – who they knew to be denying use – put them on notice that the "InstaCup" screening was faulty. If there was a well-founded suspicion to be had here, it was that the "InstaCup" screening was going to produce a third false positive. That is in fact what happened. RP 41.

- c) The trial court should have ruled that Officer Campbell's arrest of Mr. Doty was pretextual.

"[T]he facts surrounding this whole thing kind of smell, to tell you the truth," commented the trial judge. RP 105. The trial court agreed with the supervising CCO's decision not to arrest Mr. Doty: "I think Officer Woolcock was correct in doing what he did." RP 107-108. The trial court also recognized Officer Campbell had his mind made up

about Mr. Doty: “I think we all know why he – he arrested him because he wanted to.” RP 108. (See also RP 58-59, 70-71 and CP 25-26 for Ms. Wilsdon’s testimony and Officer Campbell’s admission of his bias against Mr. Doty.)

Although the trial court did not explicitly find that Officer Campbell lacked credibility as a witness, the trial court rejected two of the CCO’s claims that Mr. Doty had violated supervision by contact with felons. CP 58. Regarding the alleged contact between Mr. Doty and Ms. Stewart, the trial court agreed with the defense that Officer Campbell’s claims were unfounded: “I don’t think there’s enough evidence to support an arrest based upon the fact that either she’s on the porch or talking to him in the car... the contact has to be more than just a casual contact.” RP 106. Similarly, the trial court had reservations about Officer Campbell’s attempt to justify Mr. Doty’s arrest by way of an alleged anonymous phone call:

The call from the informant -- there’s just no evidence whatsoever on that. And I -- I just thought it was kind of coy how he [Officer Campbell] was trying to put that in there, and there’s no evidence or telling why he even brought it up. But he brought it up. It’s not a basis for the arrest. It’s not a basis for reasonable suspicion. It has nothing, nothing to go on.

RP 105-106.

Officer Campbell's bias against Mr. Doty was evident and shows that the arrest was a pretext. The insinuation that Officer Campbell was acting on the basis of an anonymous tip was soundly rejected as cause to believe that Mr. Doty violated probation. However, that "coy" fashion in which Officer Campbell brought this up reveals his subjective motivation in arresting Mr. Doty on sight.

In State v. Ladson, the State Supreme Court held that in determining whether a seizure was pretextual, the courts "should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." 138 Wn.2d at 359. The contrast between Officer Woolcock's correct decision to wait for laboratory analysis⁶, and Officer Campbell's actions is telling.

The trial court should have held that Mr. Doty's arrest for the alleged violation of a sentence condition was a pretext and suppressed.⁷

⁶ "I just thought I'd turn it in and make sure." RP 45.

⁷ Defense alleged an article I, sec. 7 violation and cited to Ladson in its motion to suppress. CP 11. The trial court ruled what occurred did not "come to a pretext." RP 108.

- d) Reversal and dismissal is required.

Evidence obtained from an illegal search and seizure is subject to suppression under the exclusionary rule. Wong Sun v. U.S., 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Gaines, 154 Wn.2d 711, 716–17, 116 P.3d 993 (2005). The proper remedy is reversal and remand with instructions to suppress the evidence, without which the charge must be dismissed.

2. The State failed to prove Mr. Doty’s criminal history and he was sentenced with an incorrect offender score.

- a) The prosecution must prove a person’s criminal history before the court may calculate the accurate criminal history at sentencing.

Due process requires the State bear the burden of proving an individual’s criminal history and offender score by reliable evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. 14; Const. art. I, § 3. “It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.” State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to

sentence a person on the basis of crimes that the State either could not or chose not to prove.” Ford, at 480, 973 P.2d 452 (1999) (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

Proof of criminal history may not rest upon mere allegation to satisfy the fundamental requirements of due process. Mendoza, at 920; RCW 9.94A.500. This Court reviews the trial court’s calculation of the offender score de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

In both Hunley and Mendoza, the sentencing court relied on a statement the prosecutor presented the court with a list asserting the defendant’s criminal history. Id. The list included the name of the crime and its date “but did not include any other documentation to verify the convictions.” Id. Neither defendant objected. Id. (Here, Mr. Doty and his counsel refused to endorse the summary as accurate. CP 77.)

The Mendoza Court ruled that the prosecution’s list of criminal history did not constitute the necessary “presentence report” prepared by the Department of Corrections, and the defendant’s failure to object did not constitute an acknowledgement of criminal history. 165 Wn.2d at 925. In Hunley, the defendant’s criminal history was “established

solely on the prosecution's summary assertion of the offenses." 175 Wn.2d at 913. "And Hunley never affirmatively acknowledged the prosecution's assertions regarding his criminal history." Id.

The Hunley Court rejected an attempt by the Legislature to overrule Mendoza and provide that a prosecutor's assertion of a defendant's criminal history established the pertinent history unless the defendant expressly objected. Id. at 914 (citing RCW 9.94A.500(1); RCW 9.94A.530(2)). Hunley explained that the prosecution's burden of proof at sentencing "was rooted in principles of due process" and could not be overruled by the Legislature. Id. It was unconstitutional to shift the burden of proof at sentencing to the defendant. Id. Consequently, "[o]ur constitution does not allow us to relieve the State of its failure" to establish a person's prior convictions "through certified copies of the judgments and sentences or other comparable documents. Id. at 915. An "unsupported criminal history summary from the prosecutor" does not establish a defendant's criminal history. Id. at 917.

Unless the defendant affirmatively agrees to the criminal history and standard range calculation offered by the prosecution, "the defendant's failure to object to the State's assertion of out-of-state criminal history did not waive the issue on appeal." Mendoza, 165

Wn.2d at 926 (citing Ford, 137 Wn.2d at 483-85). Even when a defendant pleads guilty, “a defendant cannot agree to a sentence in excess of the authority provided by statute.” Id. at 927 (citing In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002)). “Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation.” Mendoza, 165 Wn.2d at 928. The prosecution must offer evidence to establish its asserted criminal history. Id. at 928-29. “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting Goodwin, 146 Wn.2d at 867–68).

The best evidence of a prior conviction is a certified copy of the judgment and sentence. Hunley, 175 Wn.2d at 910. However, the State may also establish criminal history by presenting comparable certified documents of record or transcripts of prior proceedings. Id. at 910-11. The record below was insufficient.

- b) The unsupported assertion of Mr. Doty's criminal history failed to prove the Oregon priors.

A conviction from another jurisdiction may not be included in a person's offender score unless the prosecution proves the prior conviction is valid and comparable to a specific Washington felony. RCW 9.94A.525(3); Ford, 137 Wn.2d at 480; see also State v. Duke, 77 Wn.App. 532, 535-36, 892 P.2d 120 (1995) (foreign conviction could not be included in offender score because State failed to prove underlying conduct met statutory elements under Washington law). The statutory elements of a foreign conviction may not be the same as a similarly named Washington offense, and if broader than the elements of a similar Washington statute, "the foreign conviction cannot truly be said to be comparable." In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Additionally, the court must classify an out-of-state conviction so the court may determine whether the prior conviction did not "wash out." Ford, 137 Wn.2d at 479; RCW 9.94A.525(2). "[C]lassification is a mandatory step in the sentencing process under the SRA." Id. at 483.

Prior class B felonies wash out "if, since the last date of release from confinement ... or entry of judgment and sentence" the offender

spent consecutive years in the community without being convicted of any new crime. RCW 9.94A.525(2)(b). A five year wash out period applies to a Class C felony. RCW 9.94A.525(2)(c).

The prosecution's written assertion of Doty's criminal history lists prior crimes from Oregon. CP 74-77. The prosecution did not supply any documentation about the priors and did not prove the classification or comparability with a Washington crime, nor did the prosecution prove lack of "wash out."

The prosecution did not meet its burden of proof at sentencing. Yet, without conducting any analysis, the trial court considered an offender score of nine. CP 66. This was error.

c) A new sentencing hearing is required.

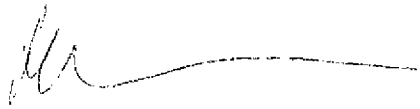
The prosecution's failure to meet its burden of proof requires resentencing without reliance on the unproven criminal history allegations. Mendoza, 165 Wn.2d at 930. The remedy is reversal and remand for resentencing.

F. CONCLUSION.

For the reasons stated above, Mr. Doty respectfully asks this Court to reverse the trial court's ruling on the motion to suppress and remand this case with instructions to dismiss. In the alternative, Mr. Doty requests a new sentencing hearing.

DATED this 28th day of January 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mick Woynarowski', written over a horizontal line.

MICK WOYNAROWSKI (WSBA 32801)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 46456-0-II
)	
ROBERT DOTY, JR.,)	
)	
Appellant.)	

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